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File No.: 110405

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Barcroft Media, Ltd. and FameFlynet, Inc., Plaintiff, vs. Mode Media Corporation, Defendant.	Docket No: **COMPLAINT**

Barcroft Media, Ltd. ("Barcroft") and FameFlynet, Inc. ("FameFlyNet") (hereinafter collectively referred to as "*Plaintiffs*"), by and through its undersigned counsel, for their Complaint against Defendant Mode Media Corporation ("*Defendant*") states and alleges as follows:

INTRODUCTION

1. This action seeks to recover for copyright infringement. Plaintiffs herein provide entertainment-related photojournalism goods and services and own the rights to photographs featuring celebrities which they license to online and print publications. Plaintiffs have obtained U.S. copyright registrations covering many of its photographs, and many others are the subject of pending copyright applications.

2. Defendant owns and operates a website known as www.mode.com (the "*Website*") and, without permission or authorization from Plaintiffs, actively copied, stored,

modified, and/or displayed Plaintiffs' photographs on the Websites without permission or authorization from Plaintiffs and engaged in this misconduct knowingly and in violation of the United States copyright laws.

PARTIES

3. Barcroft is an international media content company based in London, England, that maintains an office in Kings County, New York.

4. FameFlyNet is a California Corporation and maintains its principal place of business in Los Angeles County, California.

5. On information and belief, Defendant Mode Media Corporation, is a Delaware Corporation with a principal place of business in New York County, New York and is liable and responsible to Plaintiffs based on the facts herein alleged.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the federal copyright infringement claims pursuant to 28 U.S.C. §1338(a) and 28 U.S.C. §1331.

7. This Court has personal jurisdiction over Mode Media Corporation because Mode Media Corporation maintains an office in New York.

8. Venue is proper under 28 U.S.C. §1391(a)(2) because Mode Media Corporation does business in this Judicial District and/or because a substantial part of the events or omissions giving rise to the claim occurred in this Judicial District.

FACTS COMMON TO ALL COUNTS

9. The Website is popular and lucrative enterprises that purposefully display celebrity and/or news photographs, including Plaintiffs' copyrighted photographs.

10. The Website is monetized in that it contains paid advertisements and/or sells merchandise to the public and, on information and belief, Defendant profits from these activities.

11. Without permission or authorization from Plaintiffs, Defendant volitionally selected, copied, modified, stored and/or displayed Plaintiff copyright protected photographs (hereinafter collectively referred to as "*Photographs*"), as set forth in Exhibit "1" which is

annexed hereto and incorporated in its entirety herein, on the Website.

12. On information and belief, the Photographs were copied, modified, stored and/or displayed without license or permission, thereby infringing on their copyrights (hereinafter collectively referred to as the "*Infringements*").

13. As is set forth more fully in Exhibit "1", each listed Infringement contains the URL ("*Uniform Resource Locator*") for a fixed tangible medium of expression that was sufficiently permanent or stable to permit it to be communicated for a period of more than transitory duration and therefore constitutes a specific item of infringement. *17 U.S.C. §106(5); Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

14. Each listed infringement in "Exhibit 1" is an exact copy of Plaintiffs' original image that was directly copied and stored by Defendant on the Website.

15. Each infringement listed in "Exhibit 1" constitutes a separate and distinct act of infringement by Defendant.

16. On information and belief, poster Valis Vicenty was an employee of Defendant.

17. On information and belief, poster Valis Vicenty was an editorial producer for the Website.

18. On information and belief, poster Pip Ellwood was an employee of Defendant.

19. On information and belief, poster Pip Ellwood was an Entertainment Focus Editor and Digital Marketer for the Website.

20. On information and belief, poster Jennifer Duvall was an employee of Defendant.

21. On information and belief, poster Jennifer Duvall was a Curator and Content Creator for Mode for the Website.

22. On information and belief, Defendant takes an active and pervasive role in the content posted on its Website, including, but not limited to copying, posting, selecting, commenting on and displaying Plaintiffs' Photographs.

23. 17 U.S.C. §512, also known as the Digital Millennium Copyright Act ("DMCA") provides a defense against an infringement that is "by reason of the storage at the direction of a user." The applicable legislative history provides that "[i]nformation that resides on the system or network operated by or for the service provider through its own acts

or decisions and not at the direction of a user does not fall within the liability limitation of subsection (c).” *See* S.Rep. No. 105–190, at 43 (1998).

24. Defendant's conduct is not safe harbored by DMCA, in that, on information and belief, Defendant has failed to register with the United States Copyright Office pursuant to 17 U.S.C. §512.

25. On information and belief, Defendant was aware of facts or circumstances from which the determination regarding the Infringements was apparent. Defendant cannot claim that it was aware of the infringing activities, including the specific Infringements which form the basis of this complaint, since such a claim would amount to only willful blindness to the Infringements on the part of Defendant.

26. On information and belief, Defendant engaged in the Infringements knowingly and in violation of applicable United States Copyright Laws.

27. On information and belief, Defendant’s employees and agents created, authored, posted, participated in and/or commented on “threads,” articles or postings including those featuring Plaintiff’s copyright-protected Photographs.

28. On information and belief, Defendant’s employees and agents actively reviewed, monitored, commented on, deleted and “cleaned” postings, articles and threads similar to and including those featuring Plaintiff’s copyright-protected Photographs.

29. On information and belief, the Photographs are readily identifiable as copyright-protected as they contain a copyright watermark on the image, thereby making Defendant’s infringement willful as a matter of law.

30. On information and belief,, Defendant has the legal right and practicable ability to control and limit the infringing activities on their Website and exercised and/or had the right and ability to exercise such right, which, on information and belief, is evidenced by the following:

(a) Defendant’s employees and agents had complete control over and actively reviewed and monitored the content posted on the Website.

(b) Defendant admits that it monitors the content on the Website.

(c) Defendant’s employees and agents actively review, modify and delete or “cleaned” postings, articles and threads on the Website.

31. On information and belief, Defendant has received a financial benefit directly

attributable to the Infringements. Specifically, by way of the Infringements, Defendant experienced increased traffic to the Website and, in turn, realized an increase in its advertising revenues, brand awareness, readership base, sponsorship fees, and partnership opportunities.

32. On information and belief, a large number of people have viewed the unlawful copies of the Photographs on the Website.

33. On information and belief, Defendant at all times had the ability to stop the reproduction and display of Plaintiffs' copyrighted material.

34. As a result of Defendant's misconduct, Plaintiffs have been substantially harmed.

FIRST COUNT
(Direct Copyright Infringement, 17 U.S.C. §501 et seq.)

35. Plaintiffs repeat and incorporate by reference the allegations contained in the preceding paragraphs, as though set forth in full herein.

36. The Photographs are original, creative works in which Plaintiffs own a valid copyright properly registered with the United States Copyright Office.

37. Plaintiffs have not licensed Defendant the right to use the Photographs in any manner, nor have Plaintiffs assigned any of its exclusive rights in the Copyrights to Defendant.

38. Without permission or authorization from Plaintiffs and in willful violation of their rights under 17 U.S.C. §106, Defendant improperly and illegally copied, stored, reproduced, distributed, adapted, and/or publicly displayed works copyrighted by Plaintiffs thereby violating one of Plaintiffs' exclusive rights in its copyrights.

39. Defendant's reproduction of the Photographs and display of the Photographs on the Website constitutes willful copyright infringement. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361 (1991).

40. On information and belief, thousands upon thousands of people have viewed the unlawful copies of the Photographs on the Website.

41. As a direct and proximate result of Defendant's misconduct, Plaintiffs have been substantially harmed and should be awarded statutory damages against Defendant pursuant to 17 U.S.C. §504(c) of up to $150,000 per infringement in an amount to be proven at trial.

SECOND COUNT
(Vicarious Copyright Infringement)

42. Plaintiffs repeat and incorporate, as though fully set forth herein, each and every allegation contained in the preceding paragraphs, as though set forth in full herein.

43. At all material times hereto, on information and belief, Defendant had the legal right and practicable ability to supervise, control, limit, and stop the infringing conduct of its employees, agents and members, and yet, Defendant declined to exercise such right and ability in the instant case.

44. For example, on information and belief, Defendant had the practicable ability to police the images on the Website when its employees and agents edited, modified and/or interacted with the Photographs and, therefore, had the right and ability to supervise and control the infringing Photographs.

45. As a direct and proximate result of such refusal to exercise its right to stop or limit the infringing conduct, on information and belief, Defendant's members have continued to infringe upon Plaintiffs' Photographs, which in turn generates profits for Defendant directly from the use of the Infringements.

46. On information and belief, Defendant enjoyed a directed financial benefit from the infringing activity of its members, employees and agents from, inter alia, advertising revenue derived from the increased traffic to its Website and from increase in fees paid by sponsors.

47. On information and belief, Defendant further enjoyed a directed financial benefit from using the "draw" of Plaintiffs' Photographs to increase user traffic, thereby increasing advertising revenue, sponsorship fees, partnership opportunities, brand awareness, and its readership base.

48. Accordingly, Defendant is liable as a vicarious infringer since it profited from direct infringement while declining to exercise a right to stop or limit it. *See e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d. 1146, 1171 (9th Cir. 2007); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005).

49. As a direct and proximate result of Defendant's misconduct, Plaintiffs have been substantially harmed and should be awarded statutory damages against Defendant pursuant to 17 U.S.C. §504(c) of up to $150,000 per infringement in an amount to be proven

at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment as follows:

That the Court enters a judgment finding that Defendant has infringed on Plaintiffs' rights to the Photographs in violation of 17 U.S.C. §501 et seq. and award damages and monetary relief as follows:

a. Statutory damages against Defendant pursuant to 17 U.S.C. §504(c) of up to $150,000 per infringement or in the alternative Plaintiffs' actual damages and the disgorgement of Defendant's wrongful profits in an amount to be proven at trial; and

b. A permanent injunction against Defendant pursuant to 17 U.S.C. §502; and

c. Plaintiffs' attorneys' fees pursuant to 17 U.S.C. §505; and

d. Plaintiffs' costs; together with

e. Such other relief that the Court determines is just and proper.

DATED: September 27, 2016

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